MOTION FILED

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No. 06-480

IN THE

Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC., doing business as Kay's Kloset . . .
Kay's Shoes,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, the National Association of Manufacturers (NAM) moves for leave to file the attached brief *amicus curiae* in support of the petition. The Petitioner has consented to the filing of this brief. The Respondent has not, necessitating this motion.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role that manufacturing plays in America's economic future and living standards.

The NAM's members face competition from domestic and foreign rivals, and thus have an abiding interest in the standards used to judge the legality of competitive practices. Indeed, because many of the NAM's members introduce their products into the marketplace through independent dealers, the NAM has a great concern about *per se* antitrust rules that stifle service and promotional programs that ultimately benefit consumers.

The NAM accordingly submits this brief in support of the petition because it presents a rare opportunity for this Court to reevaluate the utility of the *per se* rule against minimum resale price maintenance announced in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). In the 95 years since that case was decided, subsequent courts, including this one, have sought to soften its blow by elevating formal distinctions above antitrust substance—an awkward and illogical end-run around the *Dr. Miles* rule. In particular, because *Dr. Miles* precludes courts from evaluating the competitive effects of a vertical price restraint, courts instead have focused their attention on whether any agreement to fix prices exists, rather than on evidence of consumer harm caused by a given vertical price restraint. The unsurprising byproduct of an analytical inquiry focused exclusively on the agreement or conspiracy element required for a Sherman Act Section 1 claim is an incoherent body of vertical restraints law that produces different results in cases with identical potential impact on consumers. This incoherence in turn forces manufacturers like the members of the NAM to walk a precarious line in their relationship with the dealers that distribute their products, with aggressive pro-competitive strategies that serve consumer welfare on one side—and treble damages on the other.

With its brief, the NAM seeks to contribute to the Court's understanding of the harmful distortions *Dr. Miles* has worked in the law of vertical restraints and the profound consequences those distortions continue to create for manufacturers in a fiercely competitive marketplace. Accordingly, the NAM respectfully requests that the Court

grant its motion for leave to file the attached brief *amicus curiae* in support of the petition.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing in America's economic future and living standards.

The NAM has participated in a number of cases before this Court, including cases involving antitrust issues. *See Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co., Inc.*, No. 05-381 (2006); *Volvo Trucks North Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997); *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). And the NAM has a great interest in the question presented by the petition—whether vertical minimum resale price maintenance agreements should constitute *per se* antitrust violations, or whether they instead should be reviewed under the rule of reason—because the answer to that question has enormous practical importance for its members around the country.

The members of the NAM include numerous manufacturers that rely on independent dealers for distribution of their products to consumers. As a consequence of the inflexible *Dr. Miles* rule prohibiting manufacturers from agreeing on resale prices with the dealers who deliver their products to the consumer marketplace, this Court and lower courts have focused their attention on whether a manufacturer and its dealers have agreed to fix prices, rather than on whether a given vertical price restraint enhances or harms consumer welfare. The formalistic distinctions resulting from this myopic focus have unfortunately produced an inconsistent and arbitrary body of vertical restraints precedent that does not even facially implement the purposes of the antitrust laws. This state of affairs compels the NAM's members to focus on technical distinctions rather than economic realities as they attempt to reach arrangements with their dealers that will permit them to compete effectively in the marketplace but will not at the same time constitute an antitrust violation with a concomitant treble damages sanction.

The NAM thus offers this brief because of the critical stake its members have in ensuring that they can legally enter into

arrangements with dealers to enhance inter-brand competition and ultimately to benefit consumers.[1]

SUMMARY OF ARGUMENT

Nearly a century ago, in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), this Court announced a *per se* rule against vertical price restraints. Since then, *Dr. Miles* has proven to be "one decisive misstep that has controlled a whole body of law." Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 32 (Free Press 1993). With that case, "the law of resale price maintenance * * * has been rendered mischievous and arbitrary to this day by the premise laid down there." *Id.*

Dr. Miles has wreaked havoc not just in the law of resale price maintenance. Almost immediately after it was announced, this Court and the lower courts began to seek ways to cabin its reach. But they have done so only by tinkering with another area of antitrust law—namely, the standard for determining whether an "agreement" to restrain trade exists under Section 1 of the Sherman Act. *See* 15 U.S.C. § 1. Because the *per se* rule of *Dr. Miles* forecloses all inquiry into the competitive effects of resale price maintenance, courts have focused their attention on evidence of "agreement," rather than on the harm—or benefit—to consumers from a given practice. But as this Court has explained, "the primary purpose of antitrust laws is to protect interbrand competition," *State Oil Co.* v. *Kahn*, 522 U.S. 3, 15 (1997) (citing *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988)), not to regulate manufacturer-dealer relationships.

The consequence of this persistent distraction from the proper aim of antitrust has been the emergence of a body of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

law that is contradicted by the plain economic realities of modern commercial life and that has necessarily produced divergent results in cases involving identical competitive harms. The distortions caused by *Dr. Miles* also have thrust the law of vertical price restraints into irreconcilable tension with the Court's modern antitrust jurisprudence, which is firmly rooted in sophisticated economic analysis.

This petition affords the Court an opportunity to correct the misstep in *Dr. Miles*, and in the process dispel the resulting deep inconsistencies in its antitrust jurisprudence, bring its doctrine in line with sound economic and antitrust policy, and refocus lower courts on the proper aim of antitrust law—to protect consumers from anticompetitive practices. The Court should take this opportunity, grant the petition, and give *Dr. Miles* a proper and long overdue burial.

The end of *Dr. Miles*, to be clear, will not render all vertical price restraints *per se lawful*. Rather, it will only make resale price maintenance arrangements between manufacturers and dealers subject to the time-tested rule-of-reason analysis, which allows courts to carefully weigh the competitive benefits and harms of a given arrangement. This Court has explicitly held that this approach is the proper default standard for assessing alleged antitrust violations absent economic justification warranting some deviation from that rule.

ARGUMENT

I. THE PETITION PROVIDES THE COURT AN OPPORTUNITY TO ELIMINATE A STRIKING ANACHRONISM FROM ITS MODERN ANTITRUST JURISPRUDENCE.

The question presented in this case is whether this Court should reconsider the *per se* restriction on vertical minimum resale price maintenance that *Dr. Miles* announced nearly a century ago in reliance on a common law prohibition against "general restraint[s] upon alienation." 220 U.S. at 404; *see also United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365,

380 (1967). The answer to that question is yes. The rule announced in *Dr. Miles* is a relic of an era in antitrust law that has long outlived its usefulness.

In its seminal decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977), this Court announced that "[r]ealities must dominate the judgment" of alleged restraints of trade and that "[t]he Anti-Trust Act aims at substance." With those statements the Court began a steady march toward a rule-of-reason approach rooted in conventional economic analysis. As the Court explained in *Sylvania*, any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Id.* at 58-59.

The Court indeed has not hesitated to overrule even relatively recent precedent in service of that directive, recognizing that in the area of antitrust it must "adapt[ ] to changed circumstance[s]," apply "the lessons of accumulated experience," and reconsider decisions when their "theoretical underpinnings * * * are called into serious doubt." *State Oil*, 522 U.S. at 20-21. Thus, in *State Oil*, the Court held maximum resale price restraints subject to the rule of reason, despite having held them *per se* invalid barely a quarter of a century earlier in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968). And in *Sylvania*, the Court held non-price vertical restraints subject to rule-of-reason analysis, even though it had subjected them to *per se* treatment only ten years earlier in *Schwinn*, 388 U.S. 365.

The *per se* rule recognized in *Dr. Miles* is of far earlier vintage than those abandoned precedents. Indeed, unlike *Albrecht* and *Schwinn*, the rule of *Dr. Miles* was adopted a month before this Court first recognized any form of the rule of reason, *see Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). As with *Albrecht* and *Schwinn*, *Dr. Miles*'s day has come.

The "great weight of scholarly opinion" has condemned *Dr. Miles*' *per se* prohibition on vertical minimum resale price maintenance arrangements. *Sylvania*, 433 U.S. at 47-48. The petition amply demonstrates the harsh treatment the rule

has received over the years at the hands of judges, economists and legal scholars. *See* Pet. 11-16. These criticisms are sound, and there is no need to recapitulate them here.

The NAM instead devotes the bulk of the following pages to a discussion of the continuing anachronisms in the law of conspiracy that have resulted from courts' efforts to apply—or indeed avoid applying—*Dr. Miles*'s outmoded *per se* ban on vertical minimum resale price maintenance arrangements in the modern commercial setting.

II. THE HARMFUL EFFECTS OF *DR. MILES* ARE NOT CONFINED TO THE RESALE PRICE MAINTENANCE CONTEXT.

Because it rendered all vertical price restraints *per se* unlawful, *Dr. Miles* has played havoc in the law of vertical restraints by affirmatively preventing courts from analyzing whether such vertical price restraints are consistent with the purpose of antitrust law to facilitate inter-brand competition. Instead of examining whether a vertical minimum resale price maintenance arrangement actually harms consumers, *Dr. Miles* restricts courts to a highly formalistic inquiry into whether a given manufacturer-dealer arrangement constitutes an agreement on prices. Because the approach required by *Dr. Miles* is at odds with economic principles this Court has embraced in other contexts, it has also necessarily placed the vertical price restraints doctrine in deep tension with other areas of this Court's antitrust jurisprudence. Specifically, *Dr. Miles* has worked significant mischief in courts' more general efforts to determine whether an agreement exists at all under Section 1 of the Sherman Act.

A. *Dr. Miles* Has Distorted The Standards For Determining The Existence Of A Conspiracy.

The Court's efforts to limit *Dr. Miles*'s reach commenced not long after *Dr. Miles* issued. In *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), the Court carved out an exception to *Dr. Miles* by affirming a manufacturer's right to announce a unilateral resale pricing policy and to enforce that

policy by refusing to do business with a dealer that will not follow it. While the Court sensibly vindicated a manufacturer's basic right to choose its dealers, *Colgate* necessarily distorted ordinary principles of contract law, under which an agreement may be formed by an offer and subsequent performance—not explicit acceptance.

Legal scholars and courts alike have recognized the deformation of contract principles that *Colgate* produced as a byproduct of its attempt to blunt the force of *Dr. Miles*. Judge Posner has explained, for example, that "if a manufacturer distributes a price list, together with an announcement that he will cut off dealers who sell below the list price, and dealers adhere to those prices because they don't want to be cut off, there is a realistic sense in which the threat of termination has induced the dealer to agree not to cut prices—to agree, in other words, to fix prices." *Isaksen* v. *Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987).

Scholars with varied perspectives similarly have stressed that the clinical approach to the agreement prong of a Sherman Act Section 1 claim required by *Colgate* necessarily produces inconsistent results. This is because *Colgate* effectively requires courts to forgo an assessment of the harm, if any, caused by an alleged vertical agreement in restraint of trade, in favor of an inquiry into whether there is sufficient evidence that an agreement exists in the first place. Thus, as two noted commentators have explained, "[i]f * * * the *Colgate* case is aggressively applied, courts will reach inconsistent results in cases with identical competitive injuries" because "[a] premium would be placed upon a plaintiff's ability to make an evidentiary showing that does not further analysis of the injury caused by the restraint." Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 325 (2000). The same commentators concluded that "[a] sound policy approach to distribution restraints emphasizes economic policy, not a sterile debate over whether a conspiracy or agreement exists." *Id.* But the law today instead requires a focus on the "agreement."

The Court's effort in *Colgate* to mitigate the error of *Dr. Miles* thus only compounded the problem. In *United States* v. *Parke, Davis, & Co.*, 362 U.S. 29, 47 (1960), the Court narrowed the rule it announced in *Colgate* by holding that the rule did not apply (and therefore that *Dr. Miles did* apply) if the manufacturer took "affirmative action to achieve uniform adherence" to its resale policy. Unlike dealers' "voluntary acquiescence" in a manufacturer's policy, the Court reasoned, affirmative action by a manufacturer interfered with a dealer's free choice and necessarily involved the assistance of other dealers in enforcing the policy—which constituted forbidden concerted action. *Id.* As a result of this distinction between voluntary acquiescence and coercion, evidence of *disagreement* between a manufacturer and dealer may thus actually signal an *agreement* to fix prices. *Cf. Isaksen*, 825 F.2d at 1163 ("[A]n agreement procured by threats is still an agreement for purposes of section 1.").

Since *Parke, Davis*, the Court has made it more difficult to prove *per se* illegal vertical agreements in some circumstances, *see Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (agreement between manufacturer and one dealer to terminate price-cutting dealer not *per se* unlawful under *Dr. Miles* unless manufacturer and remaining dealer agree on resale price or price level); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (requiring "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor" and "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective"), but these decisions have failed to mitigate the rigid formalism inherent in the basic inquiry. And the primacy the *Dr. Miles* rule (operating in conjunction with the *Colgate* doctrine) places on evidence of an agreement continues to plague the lower courts today.[2] In their effort to

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[2] *See, e.g., Center Video Indus. Co.* v. *United Media, Inc.*, 995 F.2d 735, 736 (7th Cir. 1993) (no concerted activity where video editing equipment dealer complained to manufacturer about

steer between *Colgate* and *Dr. Miles*, lower courts are driven to apply strained interpretations of contract law, while failing to address economic realities.

For example, in *The Jeanery, Inc.* v. *James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), the court concluded that there was insufficient evidence of a conspiracy for the plaintiff, a jeans retail outlet store, to submit its vertical price-fixing claim against the manufacturer to a jury. *Id.* at 1161. The court reached this result even though the manufacturer had made it abundantly clear to its dealers that it expected them to charge a "keystone" retail price for its jeans—*i.e.*, a two-fold

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discounting dealer, manufacturer requested discounting dealer to "raise the company's prices," manufacturer later terminated the discounting dealer and, on its termination, complaining dealer raised its prices "higher than the prices that it was charging while in competition" with discounter); *Parkway Gallery Furniture, Inc.* v. *Kittenger/Pennsylvania House Group*, 878 F.2d 801, 801-803 (4th Cir. 1989) (no concerted activity where furniture manufacturer adopted policy "prohibit[ing] its dealers from soliciting or selling its furniture by mail or by telephone to consumers residing outside specified areas of retail responsibility" in consultation with its dealers and in response to their complaints about discount dealers, manufacturer solicited dealer reactions to its policy, some dealers expressed agreement with policy and indicated they would abide by it, and one dealer notified manufacturer of "a violation [of the policy] and sought enforcement"); *see also Glacier Optical, Inc.* v. *Optique Du Monde*, 46 F.3d 1141 (9th Cir. 1995) (insufficient evidence of concerted action where dealers complained to supplier about discounters, supplier threatened to terminate discounters and monitored and investigated sales to discounters); *Holabird Sports Discounters* v. *Tennis Tutor, Inc.*, 993 F.2d 228 (4th Cir. 1993) (insufficient evidence of concerted action where manufacturer had policy against selling to dealers that advertised product for less than suggested retail price, monitored violations of the policy, and terminated non-complying dealer); *see generally* 1 *ABA Section of Antitrust Law, Antitrust Law Developments (Fifth)* 18-19 n.87 (ABA 2002).

markup of the wholesale price charged to the retailers—and that it would either terminate or deal less favorably with dealers that refused to charge the "keystone" price. *Id.* at 1150. This would obviously be considered concerted action in another context. But the Ninth Circuit rationalized that "this evidence [was] insufficiently probative of a conspiracy to permit the case to go to a jury," *id.* at 1157, because it did "not support a reasonable inference of concerted behavior," *id.* at 1161.

Similarly, in *Euromodas, Inc.* v. *Zantella*, 368 F.3d 11 (1st Cir. 2004), the First Circuit held that the plaintiff dealer—a retail men's clothing store—failed to adduce sufficient evidence "reflect[ing] a commitment on [the clothing manufacturer's] part to a minimum retail price maintenance scheme." *Id.* at 19. But there was evidence that when another retail men's store complained that the plaintiff was underselling it by sharply discounting the price of certain trousers, the manufacturer provided assurances that it would "take care of" the problem—and did so by terminating the relationship with the price-cutting dealer. *See id.* at 18-19. Rather than zeroing in on the question whether the termination of the price-cutting dealer was prompted by a breach of an actual agreement to fix the resale price of trousers, it would have been more consistent with the guiding purposes of antitrust law if the court had been permitted to consider whether the manufacturer's decision to retain one dealer and terminate another harmed or benefited consumers in the long run. Had the court been able to do so, its ultimate conclusion may well have been the same—but the decision would have been rooted in antitrust substance, rather than antitrust formalism. *Dr. Miles* precludes any such inquiry, however.

The formalistic approach spawned by *Dr. Miles* also undercuts the effectiveness of corporate compliance efforts. Counselors for manufacturers have to focus on whether communications with dealers contain language that could be construed as a verbal agreement, to the detriment of a proper focus on competitive effects.

The Court should take the opportunity presented by the petition to relieve lower courts and compliance counselors of the obligation to perform the sort of strained contract analysis evident in these cases—gymnastical inquiries that have created deep inconsistencies among decisions in this area of law.

B. The Distinctions Produced By *Dr. Miles* Are Directly Contrary To Economic Principles Endorsed By This Court.

The *Dr. Miles* rule has not only spawned a series of illogical and conflicting precedents; it is fundamentally inconsistent in multiple respects with the principles that animate *Sylvania*, in which this Court announced that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." 433 U.S. at 58-59.

To begin with, following *Sylvania*, vertical *non*-price restraints are no longer *per se* unlawful, but are instead judged according to the rule of reason. While *Sylvania* preserved the *per se* rule for vertical minimum resale price restraints—finding that this form of trade restraint "involve[d] significantly different questions of analysis and policy"—there is no practical economic reason why vertical non-price restraints and vertical price restraints should be subject to disparate treatment. 433 U.S. at 51 n.18. Vertical restraints of any kind can be expected to affect price. Indeed, this Court itself noted in *Sharp* that "*all* vertical restraints * * * have the potential to allow dealers to increase 'prices' and can be characterized as intending to achieve just that." 485 U.S. at 728 (emphasis added). Yet such restraints "only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand competition to the point where the dealer's profit margin permits provision of the desired services." *Id.*

In fact, an outright agreement on resale price may not even have as great an effect on intra-brand competition as a non-price restriction. A vertical agreement on price eliminates only one form of intra-brand competition; an exclusive sales

territory or forward integration—non-price restrictions—prevent all forms of intra-brand competition. The result: strategies that *entirely prevent* intra-brand competition may be lawful, but strategies that only *limit* intra-brand price competition are never lawful. *Cf. id.* at 725 ("[T]he *per se* illegality of vertical restraints would create a perverse incentive for manufacturers to integrate vertically into distribution, an outcome hardly conducive to fostering the creation and maintenance of small businesses.").

This distinction has practical consequences in concrete cases—and courts have been forced to employ extreme intellectual ingenuity to avoid its implications. In *Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir. 1978), for example, the First Circuit declined to place an acknowledged price restraint in the *Dr. Miles per se* category because it only applied to sales outside the dealer's assigned territory. The court of appeals rationalized that "[i]t may be true that defendant's policies here appear in form to *resemble resale price maintenance agreements*," but nonetheless concluded that "we are unable to conceive of how the resale price restrictions used to enforce the assigned territories in the present case can possibly have a greater anti-competitive effect than a pure policy of territorial restrictions." *Id.* at 885 (emphasis added).

Dr. Miles is also at odds with one of *Sylvania*'s fundamental insights. *Dr. Miles* was predicated, in part, on the premise that vertical price arrangements were tantamount to horizontal agreements among dealers. *See Dr. Miles*, 220 U.S. at 408. *Sylvania* rejected this equivalence and recognized that a restraint that a manufacturer, in its own interests, places on a group of dealers is much less likely to cause consumer harm than a restraint that dealers have agreed on among themselves, in their own interests. *See* 433 U.S. at 58-59 & n.28. And both defenders and critics of *Dr. Miles* agree that the most troublesome vertical price arrangements are those in which a manufacturer has been induced, or coerced, into support of a dealer cartel. *Compare* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 Geo.

L.J. 1487, 1490-1491 (1983) (explaining that "a horizontal dealer cartel with manufacturer-supplier participation is likely to produce a more stable and durable dealer cartel than a purely horizontal arrangement"), *with* Bork, *supra*, at 292 ("The dealer cartel objection arises from the observation that some seemingly vertical restraints may actually have been forced upon manufacturers by a reseller cartel."); *see also Sharp Elecs.*, 485 U.S. at 725-726 ("[V]ertical price agreements * * * might be used to organize cartels at the retailer level"); *Center Video Indus. Co.*, 995 F.2d at 737 (explaining "theory" that "prohibiting resale price maintenance agreements denies to potential retail-level cartels the only effective enforcement mechanism available to them").

Under existing precedent, however, evidence that a restraint is imposed by a manufacturer contrary to dealer preferences may convert otherwise legal agency arrangements into an illegal price conspiracy. *See Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). This not only means that evidence of fundamental *disagreement* may be used to support a *conspiracy* claim—the problem noted above, *see supra* at 8—but also that it cuts in precisely the wrong direction. *Dr. Miles* and its progeny have turned the law upside down.

III. THE DEMISE OF *DR. MILES* WILL NOT IMMUNIZE RESALE PRICE MAINTENANCE AGREEMENTS, BUT WILL SIMPLY PERMIT COURTS TO FOCUS ON ECONOMIC EFFECTS.

In light of the well-recognized economic benefits that may flow to consumers from manufacturer-driven vertical restrictions—price and non-price—the possibility that *some* vertical minimum resale price arrangements may cause anticompetitive harms does not justify *Dr. Miles*' *per se* prohibition. *Sylvania* explicitly rejected just this sort of logic. While the Court there declined to "foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition," it emphasized that the default rule

for evaluating alleged antitrust violations is the rule of reason and that any departure from that rule must "be based on demonstrable economic effect." 433 U.S. at 58-59.

Rule-of-reason review is not a free pass for antitrust defendants. At one time, to be sure, this mode of analysis was vague and generalized, *see, e.g., Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), and operated in practical effect to legitimize the competitive practice under review. *See* Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 Geo. L.J. 305 (1987). That is no longer the case.

The judiciary's growing facility with economic principles and its experience in applying the rule of reason have lent real rigor to the inquiry. *See, e.g., FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (declaring horizontal non-price agreement among competitors unlawful under rule of reason); *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984) (declaring agreement among competing colleges and universities to limit number of televised college football games unlawful under rule of reason). Indeed, this Court and the lower courts have adopted structured, or "quick look," applications of the rule of reason, *see, e.g., NCAA*, 468 U.S. at 109-111 & n.39; *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978); *Chicago Prof'l Sports Ltd. P'ship* v. *National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992), which include "screening" devices like market power tests, to retain the benefits of the sophisticated rule-of-reason analysis while reducing its associated burdens, *see, e.g., Rothery Storage & Van Co.* v. *Atlas Van Lines*, 792 F.2d 210, 221 (D.C. Cir. 1986); *Graphic Prods. Distribs., Inc.* v. *Itek Corp.*, 717 F.2d 1560, 1568-1569 (11th Cir. 1983). The guidelines adopted by the government agencies charged with enforcing the antitrust laws have further enhanced the analytical rigor of the rule of reason. *See, e.g., Department of Justice & Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors*, available at http://www.ftc.gov/bc/bcburguidelines.htm (2000).

The *Sylvania* opinion took great care to explain that the purpose of the rule-of-reason analysis is to separate competitively beneficial (or neutral) practices from those that harm consumers. As the Court explained there, "[w]hen anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under [section] 1 of the [Sherman] Act." *Id.* at 59. There is no logical reason to treat vertical price restraints differently.

CONCLUSION

For the foregoing reasons, as well as those presented in the petition, the petition should be granted.

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